(5)

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENTAL BRIEF FOR APPELLANTS

JERRY D. ANKER
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel of Record

MAX ROTHAL
Acting Director of Law
PATRICIA AMBROSE RUBRIGHT
Assistant Director of Law
161 South High Street
202 Ocasek Government
Office Building
Akron, Ohio 44308
(216) 375-2030
Attorneys for Appellants

September 21, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

TABLE OF CONTENTS

	Page
Discussion of Revised Hazard Communication Standard	1-4
Appendix—Excerpt from Preamble of Revised Hazard Communication Standard	1a

TABLE OF AUTHORITIES

Cases

United Steelworkers v. Auchter, 763 F.2d 728 (3d Cir. 1985)	2
Thornburgh v. American College of Obstretricians, 106 S. Ct. 2169 (1986)	4

Regulation

Hazard Communication Standard, as revised August 24, 1987, 55 Fed. Reg. 31,852	1-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1242

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENTAL BRIEF FOR APPELLANTS

Appellants are filing this supplemental brief to bring to the Court's attention, and to comment briefly upon, the revised Hazard Communication Standard that was issued by the Occupational Safety and Health Administration (OSHA) of the Department of Labor on August 24, 1987. 55 Fed. Reg. 31,852 (August 24, 1987).[1]

---

[1] For the convenience of the Court, we are lodging with the Clerk one copy of the revised Standard, including its explanatory preamble, in typewritten form, which we have obtained from the

This revised Standard was issued in response to the decision of the United States Court of Appeals for the Third Circuit in *United Steelworkers v. Auchter*, 763 F.2d 728, 736-39 (3d Cir. 1985), which held, *inter alia*, that OSHA had failed adequately to justify its decision to limit the original Standard to employers in the manufacturing sector. The court in that case directed the Secretary of Labor "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." *Id.* at 739.

In the newly-issued revised Standard, OSHA has now extended the Standard's coverage to non-manufacturing employers, and has "tailored" its provisions in certain respects to make it suitable for such employers. For purposes of the present case, however, the most significant aspect of the revised Standard is that it directly addresses, for the first time, the issue of preemption of local laws. Section 1910.1200(a)(2) of the revised Standard states as follows:

> (2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, *and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject.* Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the work-place, including lists of hazardous chemicals present; labeling of containers of chemicals in the

---

Department of Labor. The portions of the Standard and the preamble that bear directly on the issues of this case will be quoted in full in the body and Appendix of this brief.

> workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, *no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.*

52 Fed. Reg. 31877 (August 24, 1987) (Emphasis added).

In the preamble to the revised Standard, OSHA explained this provision as follows:

> The revised paragraph (a)(2) specifically provides that both state and local laws pertaining to occupational hazard communication are preempted by the Federal standard. In the one court decision which has addressed the question, the United States Court of Appeals for the Sixth Circuit ruled that the Federal Hazard Communication Standard preempts local as well as state laws. *Ohio Maunfacturers Association v. City of Akron*, 801 F.2d 824 (1986). The court noted that the text of § 1910.1200 (a)(2) did not mention localities and referred only to preemption of "state" laws. *Id.* at 827, 831-832. Nevertheless, relying upon references to local as well as state laws in the preamble to the 1983 standard, the court correctly inferred that OSHA had intended to preempt all non-Federal occupational hazard communication laws. *Id.* at 832. Therefore, in accordance with the Court decision, OSHA is making a technical amendment to paragraph (a)(2) so that it explicitly states that the HCS preempts local worker right-to-know laws.

52 Fed. Reg. 31,860-31,861.[2]

---

[2] The portion of the preamble that discusses the preemption issue is set forth in full in the Appendix to this brief.

The revised Standard affects this case in two respects. First, it makes clear for the first time that OSHA *does* intend the Standard to preempt local, as well as state, laws dealing with matters that are covered by the Standard. Thus, one of the issues presented in the Jurisdictional Statement appears now to be settled.

Second, the elimination of the issue of OSHA's intent brings into even sharper focus the question of OSHA's statutory *authority* to preempt local laws that do not directly conflict with the Federal standard. Now that OSHA's intent to preempt such laws is clear, the issue of OSHA's authority to do so is unavoidable.

As we have explained in detail in the Jurisdictional Statement (pp. 18-22), the issue of OSHA's authority to preempt is perhaps the most important question presented in this case. The fact that this question is now squarely presented—unencumbered by any dispute as to the Agency's intent to preempt—makes this case all the more worthy of plenary review.[3]

---

[3] Appellants' counsel recently became aware that in *Thornburgh v. American College of Obstetricians*, 106 S.Ct. 2169, 2175-76 (1986), this Court resolved the "undecided issue" of whether the Court's appellate jurisdiction under 28 U.S.C. § 1254(2) is limited to final judgments. Appellees apparently also overlooked that decision, for they failed to cite it in their Motion to Dismiss or Affirm. In light of *Thornburgh*, it appears that appellants should have brought this case before the Court by petition for certiorari rather than by appeal. There is no dispute, however, that the Court can treat the Jurisdictional Statement as a petition for certiorari and grant review on that basis (as it did in *Thornburgh*), and we urge that it do so here.

Respectfully submitted,

JERRY D. ANKER
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel of Record

MAX ROTHAL
Acting Director of Law
PATRICIA AMBROSE RUBRIGHT
Assistant Director of Law
161 South High Street
202 Ocasek Government
Office Building
Akron, Ohio 44308
(216) 375-2030
Attorneys for Appellants

September 21, 1987

APPENDIX

EXCERPT FROM PREAMBLE TO REVISED HAZARD COMMUNICATION STANDARD ISSUED AUGUST 24, 1987

The original Hazard Communication Standard included, at 29 CFR 1910.1200(a)(2), a generally-worded statement concerning the Agency's position regarding the preemptive effect of the standard. This paragraph has been revised to more explicitly state the Agency's position regarding preemption based on the provisions of the Act and related legal actions. This final rule significantly expands the number of industrial groups to which the Federal standard applies, and thus it significantly expands the area in which state and local laws will be preempted.

Section 18(a) of the Act, 29 U.S.C. § 667(a), provides that a state may assert jurisdiction through any court or agency over "any occupational safety or health issue with respect to which no standard is in effect under section 6." Conversely, where OSHA has issued a standard, section 18 expressly preempts states from asserting jurisdiction through any court or agency over the issue addressed by that standard, unless a Federally-approved State plan is in effect. 29 U.S.C. § 667(a) and (b); 29 CFR § 1901.2.

The express preemption provisions of the Act apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law would conflict with, complement, or supplement the Federal standard, and without regard to whether the state law appears to be "at least as effective as" the Federal standard. The "at least as effective as" test applies only to state standards adopted under an approved State plan. 29 U.S.C. § 667(c)(2). In enacting OSHA, Congress rejected provisions which would have permitted

states to enforce laws which were "not in conflict with" or "at least as effective as" Federal OSHA standards. *See* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 58, 706 (Comm. Print 1971). Instead, Congress enacted section 18 providing that Federally-approved State plans are the exclusive alternative to preemption.

Since the promulgation of OSHA's original Hazard Communication Standard, a number of court decisions have dealt with the effect of express and implied Federal preemption upon state and local hazard communication or "right-to-know" laws. *United Steelworkers of America v. Auchter*, 763 F.2d 728, 733-36 (3d Cir. 1985) (Federal Hazard Communication Standard expressly preempts state hazard disclosure laws in manufacturing sector); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (provisions of New Jersey right-to-know law which pertain primarily to community or environmental safety and health are not expressly preempted; right-to-know laws subject to implied preemption if they make it impossible to comply with Federal law or pose an obstacle to objectives of the Federal Act); *Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986) (similar holding in connection with Pennsylvania right-to-know law).

The revised paragraph (a)(2) specifically provides that both state and local laws pertaining to occupational hazard communication are preempted by the Federal standard. In the one court decision which has addressed the question, the United States Court of Appeals for the Sixth Circuit ruled that the Federal Hazard Communication Standard preempts local as well as state laws. *Ohio Manufacturers Association v. City of Akron*, 801 F.2d 824 (1986). The court noted that the text of section 1910.1200(a)(2) did not mention localities and referred

only to preemption of "state" laws. *Id.* at 827, 831-832. Nevertheless, relying upon references to local as well as state laws in the preamble to the 1983 standard, the court correctly inferred that OSHA had intended to preempt all non-Federal occupational hazard communication laws. *Id.* at 832. Therefore, in accordance with the Court decision, OSHA is making a technical amendment to paragraph (a)(2) so that it explicitly states that the HCS preempts local worker right-to-know laws.

The revised § 1910.1200(a)(2) not only defines hazard communication as an "issue" under the terms of the Act, but also enumerates the generic areas addressed by the standard for purposes of establishing the parameters of preemption. Thus any State or local government provision requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan.